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IN THE

Supreme Court of the United States

October Term, 1985

MILDRED V. DRAKE

v.

RAYMARK INDUSTRIES, INC., et al.,
Petitioners

v.

BATH IRON WORKS CORPORATION,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

I. DID THE LOWER COURT ERR IN HOLDING THAT CLAIMS BY SHIPYARD WORKERS FOR INJURIES CAUSED BY ASBESTOS EXPOSURE IN THE COURSE OF SHIPBUILDING AND SHIP REPAIR ARE NON-MARITIME, AND THEREFORE OUTSIDE THE SCOPE OF SECTION 905(b)?

II. DID THE LOWER COURT ERR IN HOLDING THAT THE IMMUNITY PROVIDED BY SECTION 905(a) AND SECTION 933 BARS CONTRIBUTION ACTIONS BROUGHT BY THIRD-PARTY TORTFEASORS AGAINST AN EMPLOYER UNDER THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT?

III. WHEN THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT AND A STATE COMPENSATION ACT PROVIDE CONCURRENT COVERAGE FOR AN EMPLOYEE'S INJURY, SHOULD THE EMPLOYEE'S INITIAL ELECTION OF COMPENSATION UNDER THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT CONTROL THE EMPLOYER'S LIABILITY TO THIRD-PARTY TORTFEASORS UNDER STATE LAW?

OPINIONS BELOW

Raymark reprints in it's Petition the decision of the First Circuit below and the District Court's Memorandum and Order from which appeal was taken. In granting summary judgment in Drake, the District Court incorporated the reasoning of two earlier decisions on issues significant to the Petition. In Bernier v. Johns Manville Sales Corp., 78-98 P(D.Me. August 9, 1982), the District Court held that Bath Iron Works Corporation (hereinafter "BIW") was not the owner or owner pro hac vice of the vessels at its shipyard upon which employees were exposed to asbestos. This Memorandum, Opinion and Order is reprinted as Appendix A. The District Court also held that section 4 of the Maine Workers Compensation Act (hereinafter "MWCA")

could bar contribution actions against BIW even if the employee initially filed a claim only under the LHWCA. See In re All Maine Asbestos Litigation (BIW cases) (D. Me., July 4, 1984) (reprinted as Appendix B). Raymark Petitions for Certiorari on this latter issue, but not on the question of vessel ownership.

STATEMENT OF CASE

The Respondent BIW adopts the Statement of the Case in the Petition with the exceptions and additions noted below.

A. FACTS

Many of the approximately 300 asbestos cases do not involve exposure solely while on vessels in navigable waters. Employees were exposed to asbestos on land and/or while working on

vessels in navigable waters. Forest Drake allegedly was exposed to asbestos in both places.

While neither Forest Drake nor his widow ever applied for or received benefits under the MWCA, BIW's status as an "assenting" employer meant that compensation benefits were available under that Act throughout the relevant period of time.

B. FIRST CIRCUIT DECISION

The First Circuit disposed of all claims against BIW by resolving two legal issues. First, the Court held that section 905(b) had no application to the asbestos cases because the Executive Jet requirement of a nexus to traditional maritime activity was not satisfied. According to the Court, the scope of section 905(b) is co-extensive with the

prevailing contours of maritime jurisdiction. Secondly, the Court concluded that section 905(a) barred contribution actions against employers. The Court rejected Raymark's contention that the decision in Lockheed v. United States, 460 U.S. 190 (1983) warranted a reversal of consistent Supreme Court and lower court decisions construing section 905(a) as a bar to contribution actions.

The First Circuit did not disturb the District Court's conclusions that BIW was not an owner or owner pro hac vice of vessels and that section 4 of the MWCA operated to bar contribution actions against BIW regardless of whether the employee in question initially filed a compensation case under the LHWCA or the MWCA.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. THIS COURT SHOULD NOT ADDRESS THE INTERRELATIONSHIP OF MARITIME JURISDICTION AND SECTION 905(b) IN THIS CASE BECAUSE BIW'S STATUS AS NEITHER AN OWNER NOR OWNER PRO HAC VICE OF THE VESSELS MAKES RESOLUTION OF THE SECTION 905(b) ISSUE IRRELEVANT TO THE OUTCOME OF THIS CASE.

Raymark requests certiorari on only one of several interdependent prerequisites to liability under section 905(b). Raymark asserts that section 905(b) forms the necessary predicate for a contribution claim by giving BIW employees a direct cause of action against their employer under certain circumstances. Section 905(b) on its face addresses only claims by employees under the Act, not claims of third parties such as Raymark. Raymark's interest in section 905(b) flows from an understanding that a contribution claim

conceivably may exist against BIW if BIW employees possess a direct claim against their employer.

BIW cannot be held liable to its employees under section 905(b) unless all of the following propositions are true: (1) At material times, BIW was an owner pro hac vice of vessels under construction and repair at the shipyard; (2) the injuries to BIW employees caused by asbestos exposure are within general maritime jurisdiction; and (3) the injuries to BIW employees were not caused by "persons engaged in providing shipbuilding or repair services to the vessel" (33 U.S.C. §905(b)).

After a thorough review of the record, the District Court held that BIW was not an owner or owner pro hac vice because any control by BIW over the

vessels under construction and repair at its shipyard was merely incidental to construction and repair operations. Raymark does not seek review of this determination, but requests certiorari on another prerequisite to section 905(b) liability of absolutely no relevance unless BIW was an owner or owner pro hac vice of the vessels.

II. A CONFLICT AMONG THE CIRCUITS DOES NOT EXIST ON THE QUESTION OF WHETHER SECTION 905(b) APPLIES ONLY TO THOSE CLAIMS WITHIN THE ADMIRALTY JURISDICTION OF THE FEDERAL COURTS.

The Petition of Raymark cites several cases in support of the contention that the Circuit Courts of Appeal are in conflict on the issue of whether the test of Executive Jet Aviation Inc., v. City of Cleveland, 409 U.S. 249 (1972), applies to section

905(b) claims. With the possible exception of Hall v. Hvide Hull No.3, 746 F.2d 294 (5th Cir. 1984), cert. denied, 106 S. Ct. 69 (1985), none of those cases directly address the jurisdictional issue, particularly the interrelationship of section 905(b) and traditional maritime jurisdiction. In fact, the cases cited by Raymark as implicitly inconsistent with Drake involve distinct factual scenarios probably within the scope of maritime jurisdiction as delineated by Executive Jet.

In Stass v. American Commercial Lines Inc., 720 F.2d 879 (5th Cir. 1983) the employee fell through an open hatch when he slipped on soybeans left on the ship's deck. The employee in Kalogeros v. Brasileiro 446 F. Supp. 1975 (S.D.N.Y. 1978) alleged that he slipped on oily

stairs when descending to the engine room. The regular ship's crew was in charge of the vessel and engine room. The case of Savoy v. United States, 469 F. Supp. 301 (E.D. La. 1978) also involved an employee who fell while descending stairs. The employee claimed that the stairs were hazardous because of an excessive incline. The employee in DiLorenzo v. Robert E. Lee, Inc., 412 F. Supp. 1012 (E.D. La. 1976) asserted a claim based on the negligence of the vessel's captain in throwing fuel oil on the deck. In Harrelson v. United States, 420 F.Supp. 788 (S.D. Ga. 1976), affirmed 548 F.2d 353 (5th Cir. 1977), an employee testing cargo tanks for leaks was struck by an unidentified object allegedly left by the ship's crew on a set of grated stairs. The employee in

Hill v. Texaco Inc., 674 F.2d 447 (5th Cir. 1982) slipped and fell while inspecting a gasoline storage tank for rust. The barge owner in Allied Towing Corp. v. Tatem, 580 F.2d 702 (4th Cir. 1978) was negligent in carrying a grade of fuel for which it was not certified. The barge exploded when welders began repairs on a leak. Finally, the employee in McCarthy v. The Bark Peking, 716 F.2d 130 (2nd Cir. 1983) fell while painting the upper mainmast and spars of the vessel.

None of those cases involved a hazard comparable to asbestos exposure during the construction and major overhaul of vessels. The employees in those cases were faced with hazards normally associated with the use of vessels. On the other hand, the hazard

of inhaling asbestos dust is created during the construction or rip out of the vessels by the work of the shipbuilders themselves, and cannot be analogized to hazards in existence at the time the vessel is made available to others for unloading or repair. All of the authorities offered by Raymark as evidence of an intercircuit conflict involve factual situations arguably bringing the cases within the scope of maritime jurisdiction as defined by Executive Jet. None of the cases make express holdings contrary to the First Circuit decision in Drake and Raymark's observations regarding implicit holdings are wide of the mark.

The case law in the Fifth Circuit is not sufficiently settled to warrant the conclusion that a conflict exists between the Fifth and First Circuits.

The Fifth Circuit in Hall v. Hvide Hull, 746 F.2d 294, was forced to grapple with what it perceived as its own, prior inconsistent decisions. Compare Lundy v. Litton Systems Inc., 624 F.2d 590 (5th Cir.) cert. denied, 450 U.S. 913 (1981) with Lowe v. Ingalls Ship Building, 723 F.2d 1173 (5th Cir. 1984). See also Bynum v. Patterson Truck Lines Inc., 655 F.2d 643 (5th Cir. 1981); Russell v. Atlantic and Gulf Stevedores, 625 F.2d 71 (5th Cir. 1980); Parker v. South Louisiana Contractors Inc., 537 F.2d 113 (5th Cir. 1976). Analysis of these Fifth Circuit cases reveals three distinct issues: (1) whether a certain claim

satisfies the pre-Executive Jet test for maritime jurisdiction; (2) whether a certain claim satisfies the Executive Jet test of maritime jurisdiction; and (3) what tests should be employed in determining whether a claim is stated under section 905(b). The First Circuit in Drake held that the scope of section 905(b) was governed by the Executive Jet test and that maritime jurisdiction did not exist.

The issue of whether section 905(b) can provide an independent basis for federal question jurisdiction is related to the issue of whether a claim under section 905(b) must satisfy the Executive Jet test for maritime jurisdiction. The Fifth Circuit held unequivocally that section 905(b) did not create a federal statutory cause of action and therefore

could not form an independent basis for federal question jurisdiction. See Parker v. South Louisiana Contractors Inc., 537 F.2dd at 116-17; Bynum v. Patterson Truck Lines Inc., 655 F.2d at 644; Russell v. Atlantic and Gulf Stevedores, 625 F.2d at 72. The Court in Bynum explained that "federal jurisdiction of section 905(b) claims is based upon general maritime law, 28 U.S.C. section 1331(1), not independently upon Section 905(b) statutory recognition of the right to recovery. . ." Id. at 654. Section 905(b) is merely a restatement of the negligence claim already recognized under maritime law.

In Hall v. Hvide Hull, the Court maintained that Congress, in enacting section 905(b), intended to freeze in time the prevailing concepts of maritime

jurisdiction and incorporate them into the statute, thereby insulating section 905(b) from the evolving common law of maritime jurisdiction. By locking into pre-Executive Jet admiralty concepts, the Court in Hall apparently sanctioned the assertion of section 905(b) claims without requiring the satisfaction of prevailing rules of maritime jurisdiction. The severing of section 905(b) from the confines of present day maritime jurisdiction is the equivalent of establishing a new statutory claim capable of forming the basis for federal question jurisdiction, a result disavowed in Parker, Bynum and Russell. The Hall case also may conflict with other Fifth Circuit decisions interpreting the scope of general maritime jurisdiction. See Lowe v. Ingalls Ship Building, 723 F.2d

1173 (5th Cir. 1974); Hollister v. Luke Construction Co., 517 F.2d 920 (5th Cir. 1975).

The only confusion concerning the interrelationship of section 905(b) and the law of maritime jurisdiction is within conflicting Fifth Circuit decisions, not conflicting decisions among the circuits. Even the Fifth Circuit in Hall noted that the apparent inconsistency in its decisions presented an issue of "bancworthy dimension." 746 F.2d at 295. The Fifth Circuit, however, declined the Hall panel's invitation for en banc review. As this Court demonstrated in denying the petition for certiorari in Hall, review should not be granted on the section 905(b) issue solely because of a possible intracircuit conflict in the Fifth Circuit.

Neither should the Petition be granted because of an alleged deprivation of protection for workers. See Raymark Petition at 26-28. Confining the scope of section 905(b) to claims within general maritime jurisdiction does not deprive workers of remedies intended by Congress. A lack of a maritime claim is not the equivalent of no claim at all. If maritime law does not apply, owners or occupiers of property, including vessels under construction or major overhaul, are responsible for tortious conduct under state law. Raymark's motivation in apparently rallying for employee's rights springs from a need to overcome the employer immunity of section 905(a). That explains why Raymark is not content with the employees having state law negligence claims rather than maritime

claims. If the employer is a vessel owner, only the pre-1984 version of section 905(b) penetrates the employer immunity of section 905(a).

III. THE FIRST CIRCUIT CORRECTLY INTERPRETED AND APPLIED THE EXECUTIVE JET "NEXUS" REQUIREMENT.

Raymark misconstrues both Executive Jet and the First Circuit interpretation of that decision. Raymark avoids entirely an analysis of the nature of the employee's work and the cause of injury, preferring to latch onto generalities and labels. According to Raymark, maritime jurisdiction is satisfied per se with the simple allegation that the employee was injured by the negligence of a "vessel."

The scope of maritime jurisdiction depends upon the interaction of the federal need for uniformity in matters of

maritime commerce and navigation and a due regard for the independence and jurisdiction of state governments. Although Raymark recognizes the need for uniformity as a key variable, no attempt is made in the Petition to articulate a federal interest in a uniform tort law applicable to cases of asbestos exposure. Raymark notes that "the duties of the vessel owner . . ., whose activities take him from port to port, historically have been the sole province of the maritime law. . . ." Raymark Petition at 33. Unlike most legal issues arising out of the activities of a vessel, ship construction and major overhaul do not take a vessel owner "from port to port." Significantly, BIW's alleged status as an owner pro hac vice springs solely from the "control" exercised by BIW incidental

to its ship building and overhaul operations. Since none of BIW's activities, even those as an alleged vessel owner, take it from "port to port," state law is as capable as federal law of treating BIW uniformly in all its activities.

The federal need for uniformity applies to matters of maritime navigation and commerce, matters arising from the use of a vessel as a vessel. As explained by this Court in Executive Jet:

> The law of admiralty has evolved over many centuries, designed and molded to handle problems of vessels relegated to ply the waterways of the world, beyond whose shores they cannot go. That law deals with navigational laws --- rules that govern the manner and direction those vessels may rightly move upon the waters. When a collision occurs or a ship founders at sea, the law of admiralty looks to those rules to determine fault, liability and all other

> questions that may arise from such a catastrophe. Through long experience, the law of the sea knows how to determine whether a particular ship is seaworthy, and it knows the nature of maintenance and cure. It is concerned with maritime liens, the general average, captures and prizes, limitation of liability, cargo damage and claims of salvage.

409 U.S. at 269-70. The construction or major overhaul of a vessel is a stationary, long term project. Maritime commerce and navigation are not negatively affected by a lack of uniformity flowing from the application of state tort law to claims for exposure to asbestos during construction and major overhaul of vessels. The law of the sea can claim no expertise on legal and factual matters related to claims of exposure to asbestos in the work place.

The asbestos manufacturers have fought successfully against the invocation of admiralty jurisdiction in the claims against them, yet simultaneously argue that admiralty jurisdiction applies to claims employees allegedly have against BIW. See Austin v. Unarco Industries, Inc., 705 F.2d 1 (1st Cir.), cert dismissed, 463 U.S. 1247 (1983). Raymark professes to "see no hint of inconsistency in its position." Raymark Petition at 34. The First Circuit in Austin summarized and adopted the argument of the asbestos manufacturers on the jurisdictional question:

> It argues, however, that the decedent's work was not significantly related to traditional maritime activity involving navigation and commerce, as required by the Court in Executive Jet; that injuries to shipyard workers are not a traditional concern

> of admiralty; and that the policy justifications for a uniform maritime law do not support admiralty jurisdiction in this case. After much reflection, we agree.

705 F.2d at 10-11. Raymark offers to this Court the exact opposite: that Drake's work was significantly related to traditional maritime activity involving navigation and commerce; that injuries to shipyard workers are a traditional concern of admiralty law; and that the policy justifications for a uniform maritime law do support admiralty jurisdiction. The absence of admiralty jurisdiction in Austin was not the result of Raymark's status as a manufacturer as opposed to a shipyard, but rather the result of a determination that "the hazards faced by a shipyard worker

installing asbestos are scarcely traditional concerns of admiralty . . ." 705 F.2d at 12-13.

The First Circuit's decision in Drake does not "constitute a dangerous and unwarranted erosion of the admiralty jurisdiction . . ." Raymark Petition at 34. In so characterizing the Drake decision, Raymark completely ignores the Court's emphasis on the employee's job activities and circumstances surrounding the injury. No reasonable reading of the Drake opinion supports Raymark's observation that the First Circuit held that "whether a vessel poses an unreasonable danger to those legitimately on board is better left to state tort law." Petition at 34. The First Circuit unquestionably would find admiralty jurisdiction in a wide range of cases

involving injury to those on board vessels caused by vessel owner negligence. Those exposed to the work-place hazard of asbestos during ship construction and major overhaul are appropriately excluded from that group.

IV. THIS COURT SHOULD NOT ADDRESS AT THIS TIME THE QUESTION OF WHETHER SECTION 905(a) BARS CONTRIBUTION ACTIONS AGAINST EMPLOYERS BECAUSE NO CONFLICT EXISTS AMONG THE CIRCUITS AND THE FIRST CIRCUIT'S DECISION IS CONSISTENT WITH SUPREME COURT CASES INTERPRETING THE LHWCA.

A. The case of Lockheed Aircraft Corp., v. United States, 460 U.S. 190 (1983), does not suggest or compel an interpretation of section 905(a) contrary to the First Circuit's decision in Drake.

Raymark's attack on section 905(a) rests solely upon the Supreme Court decision in Lockheed Aircraft Corp. v. United States, 460 U.S. 190 (1983). The Court in Lockheed permitted an indemnity action against the United States despite

the exclusive liability provision at 5 U.S.C. §8116(c). The Court held "only that FECA's exclusive liability provision, 5 U.S.C. §8116(c), does not directly bar a third-party indemnity action against the United States." Id. at 199.

The Lockheed decision has little or no persuasive value in the LHWCA context for two major reasons: (1) the Lockheed Court relied upon Weyerhaeuser SS Co., v. United States, 372 U.S. 597 (1963), a decision with no counterpart in the LHWCA, and (2) the Congressional silence on the immunity issue in the FECA context is in sharp contrast to the substantial leglislative history of the 1972 and 1984 LHWCA amendments.

The Court's conclusions in Lockheed regarding congressional intent do not apply to the LHWCA. The Lockheed Court noted that "in the 20 years since Weyerhaeuser was decided, Congress has not modified FECA's exclusive-liability provision to include third parties." Id. at 196. This congressional inactivity was considered "particularly significant in view of the 1966 codification of FECA which included amendments to the new section 8116 (c)." Id. 196.

The same aid to construction utilized by the Court in Lockheed, when applied to the interaction of case law and congressional activity under the LHWCA, mandates the conclusion that section 905(a) prevents contribution actions against employers. Not only has Congress been content to leave the rule

of no contribution intact, Congress has amended the LHWCA to close whatever loopholes have arisen in the employer's exclusive liability under the Act. Hence, utilization of the Lockheed Court's construction principles for discovering legislative intent generates a stronger case for disallowing contribution under the LHWCA than for allowing contribution under FECA.

In Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp., 342 U.S. 282 (1951), the Court prohibited contribution against an employer under the LHWCA. The Court in Cooper Stevedoring Inc., v. Fritz Kopke Inc., 417 U.S. 106 (1974), devoted the majority of its opinion to an anaysis of Halcyon Lines in an effort to resolve the issue of whether contribution between joint tortfeasors exists in

maritime actions for personal injuries. The Cooper Court held that maritime law recognizes contribution between joint tortfeasors and that "our decision in Halycon was, and still is, good law on its own facts." Id. at 115. The only fact differentiating Halycon from Cooper was that the contribution defendant in Halycon was an employer protected by the LHWCA. One who maintains that Halycon Lines does not stand for the proposition that section 905(a) bars contribution actions against employers must explain the meaning of Halycon in the post-Cooper era. The Court in Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 255, 261 (1975) cited Halycon Lines for the proposition that "the ship owner could

not circumvent the exclusive-remedy provision by obtaining contribution from the concurrent tortfeasor employer."

A review of the legislative history of the 1972 amendments to the LHWCA and pre-1972 case law leaves no doubt that Congress intended section 905(a) to bar standard contribution actions against employers. The 1972 amendments to the LHWCA were primarily a response to a series of Supreme Court decisions through the 1940's and the 1950's that effectively circumvented the exclusive liability provisions of section 905. See Seas Shipping Co., v. Sieracki, 328 U.S. 85 (1946); Ryan Stevedoring Co., v. Pan-Atlantic S.S. Corp. 350 U.S. 120 (1956). Although Ryan and Sieracki produced a system in which stevedores effectively lost their immunity from suit whenever a

longshoreman sued a vessel owner for unseaworthiness, during this same pre-1972 period section 905 was consistently interpreted to preclude contribution actions against employers. See, e.g., Murray v. United States, 405 F.2d 1361, 1364 (D.C. Cir. 1968); Simpson Timber Co., v. Partes, 390 F.2d 353 (9th Cir. 1968), cert. denied, 393 U.S. 858. Ocean Drilling and Exploration Co., v. Berry Brothers Oil Field Service, 377 F.2d 511 (5th Cir. 1967), cert. denied, 389 U.S. 849; Brown v. American-Hawaiian S.S. Co., 211 F.2d 16 (3rd Cir., 954); American Mutual Liability Insurance Co., v. Matthews, 182 F.2d 322 (2nd Cir. 1950); The prevailing if not universal approach prior to the 1972 amendments was to prohibit contribution because of the employer immunity provided by section

905, regardless of whether the contribution-plaintiff was a vessel-owner. In fact, the largest block of employees covered by the LHWCA prior to 1972 were private employees in the District of Columbia. The LHWCA had served as the compensation act for private employees in the District of Columbia since 1928. See 36 D.C. Code §501 (1973), repealed by D.C. Law 3-77, 27 D.C. Reg. 2503 (1980). The District of Columbia cases before 1972 consistently held that section 905 barred contribution actions against employers under the Act. See Coates v. Potomac Electric Power Co., 95 F.Supp. 779 (D.D.C. 1951); Baird v. John McShane Inc., 108 F.Supp. 553 (D.D.C. 1952).

Congress was cognizant of this universal judicial interpretation of section 905(a) at the time of the 1972 amendments. Congress in 1972 not only refrained from altering this consensus, but also added specific language to section 905 for the express purpose of eliminating the exception to employer immunity that the Supreme Court had developed in the Sieracki/Ryan line of cases.

The policy reasons behind the 1972 amendments apply to contribution actions in general. Congress specifically noted the importance of diverting resources from legal expenses to greater compensation benefits. The gradual liberalization of tort law and the landward extension of the LHWCA in 1972 substantially increased the potential for

employee third party suits against tortfeasors other than vessel owners, and correspondingly increased the volume of possible contribution claims against employers. Allowing standard contribution actions in all such cases in which the employer is potentially negligent unquestionably thwarts the objective of Congress in enacting the 1972 amendments. Lockheed has not been a source of confusion to Congress as alleged by Raymark. Senator Nichols explained that no amendment was made to section 905 (a) because "the plain meaning of the existing language indicated that there should be no third-party liability." Cong. Rec. S11621 (Sept. 20, 1984). Senator Nichols noted that the 1972 amendments were for the purpose of eliminating the problem of

circular suits whereby employers would pay workers' compensation and then become liable for additional amounts to third parties. Id. Although Senator Hatch noted that the 1984 legislation did not specifically address the impact of Lockheed, Senator Hatch explained that he personally doubted whether Lockheed posed a serious threat to longshore employers because "the Courts have long recognized that a longshore employer whose concurring negligence contributed to an employees injury cannot be sued as a joint tortfeasor by the third party seeking contribution." Cong. Rec. S11623 (Sept. 20, 1984). Finally, the Senate report on the legislation eventually passed as the 1984 amendments stated

unambiguously that vessel owner liability of shipyards should be eliminated because

> the LHWCA should adhere closely to the principle that an employer should be responsible for worker's compensation exclusive of any other recovery against the employer . . .

S. Rep. No. 98-81 at 31 (98th Cong. 1st Sess.).

As demonstrated above, the legislative history and judicial interpretation of the LHWCA is completely distinct from FECA. While those acts may be similar in language and in origin, they have taken completely different paths since their inception. The decision in Lockheed does not render appropriate a complete reversal of everything that Congress and the courts have done to protect employers under the LHWCA over the last thirty-five years.

B. Maine law does not recognize an equitable right of contribution when the exercise of that right would frustrate the public policies at the foundation of both section 4 or section 905(a).

Raymark criticizes the First Circuit's conclusion that section 905(a) bars contribution actions against employers. As noted in Lockheed, the question of whether or not an employer may be liable for contribution to third-party tortfeasors involves an assessment of the applicable immunity provision and the law of contribution. The parties in Lockheed stipulated that a valid tort indemnity claim existed against the United States. Maine law, however, does not recognize an equitable right of contribution when the equities either are not present or are outweighed by other policy considerations.

An immunity provision such as section 905(a) can operate to bar contribution on three distinct grounds: (1) the employer's direct immunity from suit by employees eliminates the joint or common liability necessary to contribution actions; (2) either the express language of the immunity provision or clear legislative intent bars contribution actions by third-parties; or (3) allowing contribution would dilute the protection afforded employers from direct suit and the policy reasons behind the basic trade-off in the compensation act outweigh the policies in favor of contribution. Although many courts tend to rely upon either the first or second grounds for denying contribution, section 905(a) should be interpreted as a bar to contribution

actions under Maine law on the third basis without regard to the applicability of other grounds. Significantly, section 4 of the MWCA bars contribution actions because of the underlying public policy and not because of a literal interpretation of the express language of section 4 or the absence of "common liability".

In barring contribution actions against employers, the Maine Supreme Judicial Court concluded that the policies in support of contribution are weaker than the policies behind the employer immunity from direct suit:

> We rule that the Legislature, in imposing absolute liability on an assenting employer without reference to fault in return for the employee's speedy recovery of fixed but limited benefits for any industrial injury, has established a comprehensive scheme for the distribution of loss by industrial accidents to the ultimate benefit of the employer, employee and the

> public at large. Under such circumstances, for this Court to shift part of the third-party tortfeasor's liability onto the assenting employer merely on the basis of the equitable doctrine that parties whose concurrent negligence has caused an injury should bear a like burden in redressing the same, would tend to frustrate pro tanto the purposes of the Act. . . . This statutory policy providing the employer with a definitive liability for payment of benefits predictable with some degree of accuracy in all industrial accidents and resting upon the employer's immunity from further damages beyond the call of the compensation act transcends any counteracting judicial considerations of equitable principles.

Roberts v. American Chain & Cable Co, 259 A.2d 43,49-50 (Me. 1969). Since contribution in Maine is based upon equitable principles and the equities do not warrant frustration of the purposes of the MWCA, the right of contribution does not exist against assenting employers under the MWCA. Whether the same result obtains under the LHWCA

depends upon a comparison of the policy reasons behind section 905(a) and section 4.

The strength of the policies favoring contribution in Maine is not enhanced merely because the immunity relied upon derives from section 905(a) rather than section 4. The right to contribution under Maine law cannot overcome section 905(a) for the same reasons it could not overcome section 4. The LHWCA and MWCA both impose absolute liability on an assenting employer without reference to fault in return for established benefits. The essence of the employer's quid pro quo is "absolute but limited and determinate liability." Id at 49. Holding an assenting employer answerable in contribution "would tend to frustrate pro tanto" the purposes of the

LHWCA to the same extent as the MWCA. If Maine assigns greater significance to the public policy underlying the MWCA than to its own right of contribution, federal courts should not hesitate to elevate the policies underlying section 905(a) above that same right of contribution. As demonstrated above, the absence of contribution against MWCA employers flows not from the technical common liability rule or express statutory language, but rather from the weight of the policies supporting section 4, the very same policies at the foundation of section 905(a).

V. THE ISSUE OF WHAT EMPLOYER IMMUNITY PROVISIONS APPLY IN CASES WITHIN THE CONCURRENT COVERAGE OF THE LHWCA AND A STATE COMPENSATION ACT DOES NOT POSE A SUBSTANTIAL FEDERAL QUESTION WORTHY OF SUPREME COURT REVIEW.

Since the asbestos cases involve the concurrent coverage of the LHWCA and the MWCA, the employer immunity provided by Maine compensation law bars contribution actions against BIW regardless of the interpretation given to section 905(a) of the LHWCA. Section 4 of the MWCA prohibits non-contractual actions for contribution or indemnity against assenting employers under the Act. See McKellar v. Clark Equipment Co., 472 A.2d 411,416 (Me. 1984). Despite the concurrent coverage of the state and federal compensation acts, Raymark maintains that an employee's election of benefits under the LHWCA precludes utilization of the employer immunity provision of a state act for the purpose of barring contribution actions. That proposition is inconsistent with

generally accepted principles of worker's compensation law. Raymark finds the invocation of Section 4 of the MWCA "troublesome" because Drake did not apply for or receive MWCA benefits. BIW, however, was an assenting employer under the MWCA as well as the LHWCA. As with all compensation acts, the immunity provided by section 4 is not triggered by a particular employee's decision to pursue compensation benefits: See 2 A. Larson, The Law of Workmen's Compensation §65.14 at 12-9 (1983). Just as section 4 protects the employer regardless of whether a compensation claim is filed at all, that protection does not evaporate simply because the employee seeks compensation under the LHWCA.

Raymark remarkably asserts that the application of section 4 in the Drake case violates the quid pro quo at the foundation of compensation acts. As explained above, the employer immunity does not depend upon the filing of a compensation claim. For example, a covered employee under the LHWCA who voluntarily foregoes his compensation remedy has no right to bring a direct tort action against his employer. Consistency requires Raymark to take the untenable position that any covered employee who voluntarily decides not to file a compensation claim for a covered injury has thereby lost his quid pro quo and therefore may recover in tort against his employer. Since Drake or his widow could have brought a compensation claim

under the MWCA, BIW may avail itself of the protection from suit afforded by that Act.

The approach advocated by Raymark requires an interpretation of the 1972 Amendments exactly opposite of that intended by Congress. In 1972, Congress eliminated every form of contribution action against employers that had been recognized by the Courts up to that point in time. As noted by Raymark, the 1972 Amendments also expanded coverage of the LHWCA shoreward to create a "broad zone of concurrent jurisdiction." Raymark Petition at 42. A vast number of compensation cases previously covered only by the state act are now covered by both state and federal compensation acts. In every case covered by only the state act prior to 1972, BIW was entitled to

full immunity from contribution claims by third-party tortfeasors. According to Raymark, the 1972 Amendments effectively overruled this state law protection of employers in every case within the zone of concurrent coverage in which the employee initially elects compensation under the federal act. When analyzed in conjunction with the landward extension of the LHWCA, Raymark's proposal that an employee's compensation election control third-party contribution rights recasts the 1972 Amendments as a vitiator of employer immunity, a remarkable feat of transformation for legislation designed to eliminate claims against employers and channel resources to compensation benefits.

VI. NO CONFLICT AMONG THE CIRCUITS EXISTS ON THE QUESTION OF WHAT EMPLOYER IMMUNITY PROVISION APPLIES IN CASES WITHIN THE CONCURRENT COVERAGE OF THE LHWCA AND A STATE COMPENSATION ACT.

Contrary to Raymark's assertions, no conflict exists among the Circuits on this issue. The Fifth Circuit in Jenkins v. McDermot Inc., 734 F.2d 229 (5th Cir. 1984) addressed an entirely different issue. The employee of a subcontractor was injured by the negligence of a general contractor under circumstances giving rise to the concurrent coverage of the Louisiana Compensation Act and the LHWCA. The Louisiana Act would have provided immunity to the non-employer, general contractor, whereas the the LHWCA protected only the actual employer. The employee sought compensation benefits under the LHWCA. The Court held that the employee could sue the general contractor because he elected federal benefits.

A key distinction exists between Jenkins and Drake. The issue in Jenkins was the recovery rights of the employee. The issue in Drake is the contribution rights of a third party against an employer. As concerns limitations on the recovery rights of an employee, the employee's election of one compensation act or another plays a legitimate role. Raymark, however, attempts to assign significance to the election of the employee even though the issue allegedly dependent upon the election, that is the employer's liability to third-parties, has absolutely nothing to do with the benefits or recovery available to the employee. Section 933 of the LHWCA expressly preserves an employee's claims against non-employer third parties. Once the employee elects federal benefits,

thereby obtaining' the rights provided by section 933, state law provisions directly contrary to section 933 are preempted. Not a single aspect of the Jenkins decision conflicts with the First Circuit's decision in Drake.

CONCLUSION

For the foregoing reasons, BIW respectfully submits that this Court should deny Raymark's Petition for A Writ of Certiorari to review any aspect of the decision of the Court of Appeals.

Respectfully submitted,

NORMAN & HANSON

Robert F. Hanson

James D. Poliquin
Attorneys for Respondent
Bath Iron Works Corp.

CERTIFICATE OF SERVICE

I, James D. Poliquin, Esq., certify that on or before the 22nd day of March, 1986, I mailed, postage prepaid, forty (40) copies of the Respondent's Brief In Opposition to the Petition for Writ of Certiorari to the Clerk of the Supreme Court of the United States, One First Street N.E., Washington, D.C. 20543, and mailed three (3) copies to Benjamin Thompson, Esq., Thompson, McNaboe & Ashley, P.O. Box 447, Portland, ME 04112, counsel for Petitioner, Raymark Industries, Inc., and mailed three (3) copies, postage prepaid, to Peter J. Rubin, Esq., Bernstein, Shur, Sawyer & Nelson, One Monument Square, Portland, Maine 04101, counsel for Owens-Illinois, Inc., Celotex Corporation, Pittsburgh

Corning Corporation, H. K. Porter Company, Inc. Southern Textile Corporation, Inc., Keene Building Products corporation and Owens-Corning Fiberglas Corporation.

James D. Poliquin

STATE OF MAINE
CUMBERLAND, ss.

Personally appeared the above-named James D. Poliquin, who subscribed and swore to this instrument this 20th day of March, 1986.

Before me,

Notary Public

NATHALIE M. BERRY
NOTARY PUBLIC, MAINE
MY COMMISSION EXPIRES OCTOBER 3, 1986

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

Civil No. 78-98 P

ROLAND J. BERNIER and DESNEIGE L. BERNIER, Plaintiffs
v.
JOHNS-MANSVILLE SALES CORP., et al., Defendants
ELLIS M. MOORE and CELIA MOORE, Plaintiffs
Civil Nos. 79-55 P and 831-0045P (Consolidated)
RAYMOND E. JONES and FRANCES JONES, Plaintiffs
v.
Civil No. 79-73 P
JOHNS-MANVILLE SALES CORP., et al., Defendants
RAYBESTOS-MANHATTAN, INC., Defendant and Third-Party Plaintiff,
v.
BATH IRON WORKS CORPORATION Third-Party Defendant

MEMORANDUM OF OPINION AND ORDER OF THE COURT

GIGNOUX, C.J.

Plaintiffs in these three actions have brought suit against various manufacturers and supplers of asbestos-containing products for injuries allegedly sustained from exposure to their products while employed at Bath Iron Works (BIW), a privately-owned shipyard in Bath, Maine. Plaintiffs seek recovery of compensatory and punitive damages on theories of negligence, breach of warranty, and strict liability. Jurisdiction is predicated on diversity of citizenship. 28 U.S.C §1332(a).

One of the defendants, Raybestos-Manhattan, Inc. (R-M), has filed in each action a third-party complaint against BIW seeking contribution and indemnity. Presently before the Court is a motion

for summary judgment filed by BIW pursuant to Fed. R. Civ. P. 56, in support of which BIW asserts that the third-party action is barred by the exclusive liability provision of Section 905(a), 33 U.S.C. §905(a), of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §901 et seq.[1] The record consists of the pleadings, affidavits, answers to interrogatories, deposition excerpts, and admissions on file.

Each of the third-party complaints, which are identical, contains six counts. The theories of recovery against BIW asserted by R-M in the first five counts have previously been rejected by this

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[1]It is undisputed that the plaintiff employees were covered by LHWCA and have received workers compensation benefits under the Act.

Court. See Austin v. Johns-Manville Sales Corporation, 508 F. Supp. 313 (D. Me. 1981). Undaunted by the Court's prior ruling, R-M in Count VI of the present third-party complaint seeks contribution and indemnity by BIW on the theory that BIW was the owner pro hac vice of the vessels under construction or undergoing repair in its yard on which plaintiffs worked, and is therefore subject to liability for negligence under Section 905(b) of the LWHCA, 33 U.S.C. §905(b).

For the reasons to be stated, the Court has concluded that BIW was not during the relevant periods the owner pro hac vice of vessels being constructed or repaired in its yard and that the cause of action asserted in Count VI of R-M's third-party complaints is therefore

barred by Section 905(a) of the LHWCA[2]. BIW's motion for summary judgment is therefore granted.

I.

The Facts

The record presently before the Court discloses that plaintiff Roland Bernier, now deceased, worked for BIW as a boiler assembler from 1942 to 1945; plaintiff Ellis Moore worked as a pipe coverer from 1955 to the present time. The record does not indicate specifically on which vessels these employees worked. Generally, during the period of their employment, however, BIW constructed new vessels and repaired or overhauled

[2]In light of the Court's determination that BIW was not an owner pro hac vice of the vessels upon which the plaintiff employees may have worked, it is unnecessary to consider the other grounds asserted by BIW in support of its summary judgment motion.

additional vessels for the United States Navy and for commercial shipowners. The record shows the following with respect to the control assumed by BIW over vessels being constructed or overhauled in its yard.

A. U.S. Navy Vessels

When BIW undertakes to construct or overhaul a ship for the U.S. Navy, the parties enter into a detailed contract which sets forth procedures and schedules to be followed during all phases of the work, and which defines the rights and duties of both parties. Generally, the contracts provide that BIW is responsible for adopting and enforcing adequate health and safety regulations (at a minium meeting OSHA regulations) and that Navy personnel have access to the vessels

undergoing construction or repair.[3] BIW does not hold legal title to any newly constructed or overhauled naval vessel at is facility.[4]

To oversee and administer the contract, the Navy maintains a permanent office at BIW. The Supervisor of Shipbuilding with a staff of over 200 closely monitors the work under the contracts. The Supervisor may unilaterally order changes in the

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[3] See R-M Exhibit E at art. 17, 20; Exhibit J. at art. J-38, J-42. A 1948 contract to construct an experimental Motor Torpedo Boat also required BIW to purchase collision insurance to cover operation of the vessel during the test runs. See R-M Exhibit K at art. 14. This requirement has not appeared, however, in more recent construction or repair contracts.

[4] Affidavit of William F. Mussenden, ¶¶ 3, 4, 5.

contracts, or stop work.[5] Any movement of the ships at the yard requires advance notification and approval of the Supervisor.[6] The Supervisor and his staff inspect work regularly; attend all tests performed pursuant to the contracts; determine whether and when trial runs of the vessels will take place; and closely monitor the trial runs.[7] The Supervisor also acts as squadron commander of all ships in the yard.

1. New Construction

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[5] See Supplemental Affidavit of William F. Mussenden, ¶¶ 2, 3.

[6] See Affidavit of William Rich, ¶6.

[7] See Affidavit of William Rich, ¶¶ 6-10, 13-16; Third-Party Defendant's Exhibit C, at 2002-09.

Construction of a new vessel begins in the BIW yard with fabrication of the hull, laying of the keel, and installation of the propulsion machinery.[8] When the hull is launched, the various combat and operation systems are installed.[9] BIW workcrews are, of course, in control of the launched hull while work is in progress. Navy personnel, however, have unlimited access and closely supervise the progress of the work. Asbestos insulation is done after the hull is launched.[10]

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[8] See Third-Party Plaintiffs' Exhibit J, at art. J-49.

[9] Id.; Deposition of John R. Newell, at 54-55.

[10] Deposition of John R. Newell, at 54-55.

If any ship must be moved from berth to berth within the yard during the course of construciton, BIW must notify the Supervisor and obtain his permission. Tugs hired by BIW, sometimes assisted by a small BIW boat, do the principal moving.[11]

Subsequent phases of construction specified in the contract call for testing of the vessel, which requires that it be operated. Two types of builder's trials are performed: "dock" trials and "sea" trials.

Dock trials involve testing the ship's systems while it is secured to the dock. BIW draws up a proposed agenda and submits it to the Supervisor for his approval. The proposed agenda outlines in detail the specific tests to be

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[11]Deposition of John R. Newell, at 59.

performed, and the manner and schedule of implementation.[12] The Supervisor reviews the proposed agenda, determines whether a dock trial is appropriate at that time, and then makes any modifications in the proposed agenda deemed necessary.[13] BIW personnel conduct the trial in strict accordance with the final agenda while the Supervisor's representatives closely monitor the trial.

Sea trials involve taking the new vessel to sea for several days to detemrine whether the contract specifications have been met. Again, BIW draws up a proposed trial agenda and submits it to the Supervisor for comment

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[12] Affidavit of Cecil Fullerton, ¶¶ 7, 8.

[13] Id.

and approval.[14] These agenda schedule in minute detail the tests to be performed as well as all vessel manuevers.[15] BIW employees drawn from the various departments comprise the vessel's crew, and BIW's yard captain, William Rich serves as the captain. The Supervisor reviews and approves the crew list. Although the BIW captain and crew actually operate the vessel during a trial, they follow strictly the schedule of the agenda which even prescribes the order of firing engines and vessel speed.[16] The Navy representatives aboard

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[14] Affidavit of William Rich, ¶¶9, 10; Affidavit of Cecil Fullerton, ¶¶7, 8.

[15] Affidavit of William Rich, at appendix B and C.

[16] See Affidavit of William Rich, at ¶16, appendix B and C.

the vessel during these trials have authority to modify a trial in progress, and even to terminate a trial.

Upon successful completion of the builder's trials, the contracts call for a "preliminary acceptance" trial. This trial essentially repeats the sea trial and serves as the final trial run before delivery of the vessel to the Navy. BIW submits a proposed trial agenda to both the Supervisor and to the Navy Board of Inspection and Survey (INSURV) in advance of the trial. INSURV determines whether a trial is appropriate; makes desired modifications in the agenda; and finally approves the trial.[17] As with the earlier sea trial, BIW submits for approval a list of crew members. Representatives of the Supervisor and

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[17] See Affidavit of Cecil Fullerton, ¶ 9.

INSURV monitor operation of the ship, and have authority to modify or terminate the trial.

Delivery is the final stage of BIW responsibility under a contract. Although at the present time, the Navy accepts vessels at BIW's facility, prior to 1969 BIW delivered the vessels to the Boston Naval Shipyard. Again, approved BIW employees comprised the crew and Rich was the captain; representatives of the Supervisor and other naval personnel, including some of the vessel's prospective officers were aboard during the trips to Boston.[18]

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[18]The record also indicates that prior to its acquisition of drydock facilities in 1980 BIW subcontracted sub-waterline painting work to other shipyards along the East coast. Trips to these facilities were conducted in the same manner as the sea trials discussed above. Permission to make the trip was secured in advance from the Supervisor. Rich was

2. Repair and Overhaul

Navy ships that are brought to Bath for repair and overhaul fall into one of two categories. Some vessels remain commissioned during the repair period. The officers and crew of these vessels stay with the ship during the period. The Navy crew controls access to the ship and is responsible for security. Regular watches are maintained, as are the ship logs. The Navy crew mans the vessel during all trials, and may assist in some of the repair work. R-M concedes that BIW is not the owner pro hac vice of Navy vessels which remain commissioned.

(footnote continued from previous page) the captain; approved BIW employees were the crew; Supervisor personnel attended and tested the ship's systems. Navy representatives approved of the drydock facilities before docking. See Affidavit of William Rich, at ¶ 19.

Vessels which require more extensive overhaul customarily are "decommissioned" shortly after arrival at the yard. When the vessels arrive, they are delivered over to the custody of the Navy Supervisor. The crew is gradually dismissed in phases and reassigned to duty on other ships. The logs are removed. When the contract work is ready to proceed, the Supervisor turns the vessel over to BIW in accordance with the contract. Six months before completion of the contract work, a nucleus crew of officers returns to the shipyard; one month before completion, a skeleton enlisted crew arrives. The ship is recommissioned after completion of the contract work and delivery to the Navy.

The contracts require BIW make adequate provisions for security and for the health and safety of workers during the repair period, and that Navy personnel at all times have access to vessels undergoing repair. Once the overhaul and repair work nears the appropriate stage, the same dock, sea and preliminary acceptance trials described above with respect to newly constructed vessels are performed on the overhauled vessels.

B. Commercial Vessels

The procedure for construction and overhaul of commercial vessels parallels closely that for naval vessels. BIW negotiates a contract with the owner that prescribes in similar detail the work to be done, the manner in which it is to be done, and the schedule for completing the

various stages of the work. The owner maintains a representative at the shipyard during all phases of the contract work. This so-called owner's representative and his assistants monitor BIW's performance under the contract in the same manner that the Navy Supervisor and his staff monitor Navy Contracts.[19] When required to move vessels in the yard from berth to berth, BIW notifies and obtains permisssion from the owner's representative.[20]

Dock and sea trials are conducted in the same manner for newly constructed commercial vessels as for naval vessels.[21] Rich is the captain; BIW

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[19]Affidavit of William Rich, ¶ 22.

[20]Id. at ¶ 23.

[21]Sea trials were not conducted on the few commercial vessels which BIW

employees are the crew. Although the BIW employees actually man and operate the vessel during all phases of a trial, they do so strictly in accordance with the trial agenda, which sets out fully and precisely all manuevers to be undertaken. The owner's representative and his staff must approve all agendas; are present during the trials; and have authority to modify a trial while in progress or to terminate the trial and order a return to port.[22]

Upon completion of the new construction or overhaul, the vessel is delivered to the owner at the BIW

(footnote continued from previous page) overhauled from 1950 to the present time. Most of BIW's commercial work involved new construction. See Deposition of William F. Mussenden, ¶ 2.

[22]Affidavit of William Rich, ¶¶ 24-26; Affidavit of Edward Atkinson, ¶¶ 3-6.

shipyard. BIW does not hold legal title to any newly constructed or overhauled commercial vessel at any time.[23]

II.

The Law

Under Section 905(b) of the LHWCA, an employee may sue a "vessel" for its negligence.[24] The term "vessel" is defined by Section 902(21) of the Act to include "said vessel's owner, owner pro

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[23]Affidavit of William F. Mussenden, ¶¶ 4,5.

[24]Section 905(b) aprovies in relevant part as follows:

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such a vessel as a third party in accordance with the provisions of section 933 of this titled, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void.

33 U.S.C. § 905(b) (emphasis added).

hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member." 33 U.S.C. §902(21) (emphasis added).[25] R-M contends that BIW, although concededly not the owner of vessels undergoing construction or repair in it's shipyard, is the owner pro hac vice of such vessels; is a vessel as defined by Section 902(21); and therefore, in its capactity as a vessel, is subject to liability to its employees for negligence under Section 905(b). See, e.g., Reed v. Yaka, 373 U.S. 410

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[25]Section 902(21) reads as follows:

> (21) The term "vessel" means any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member.

33 U.S.C. §902(21) (emphasis added).

(1963); Griffith v. Wheeling Pittsburg Steel Corp., 521 F.2d 31 (3rd Cir. 1975), cert. denied, 423 U.S. 1054 (1976). There is no question that as a compensation-paying employer, BIW is immune, by reason of Section 905(a) of the LHWCA, from third-party claims for contribution, at least to the extent that, as an employer, it is immune from common law liability to its employees. Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp., 342 U.S. 282, 285-86 (1952); Austin v. Johns-Manville Sales Corp., supra, 508 F. Supp. at 315. Thus, the parties agree that BIW may be found liable for contribution to R-M only if BIW, as a "vessel," could be found liable to the plaintiff employees. See Griffith v. Wheeling Pittsburgh Steel Corp., supra, 521 F.2d at 44.

Although the LHWCA does not define "owner pro hac vice," the governing legal principles are well settled. An owner pro hac vice is one who assumes by charter or otherwise "exclusive possession, control, command and naviagation" of a vessel for a specific period of time. Stephenson v. Star-Kist Caribe, Inc., 598 F.2d 676, 679 (1st Cir. 1979); Guzman v. Pichirilo, 369 U.S. 698, 699, 700 (1962); G. Gilmore and C. Black, Jr., The Law of Admiralty, 239-43 (2d ed. 1975). An owner pro hac vice "has complete--though perhaps only temporary--dominion over the vessel entrusted to him. He commands her navigation and is entitled to avail himself fully of her services." Olsen v. Todd Shipyards Corp., 435 F. Supp. 568, 571 (W.D. Wash. 1977). "It is therefore

tantamount to, though just short of, an outright transfer of ownership." Guzman v. Pichirilo, supra, 369 U.S. at 700.

It is clear on the instant record that BIW did not assume the kind of exclusive control over vessels being constructed or repaired in its yard to have made it the pro hac vice owner thereof. BIW's dominion over these vessels are confined to the narrow sphere of carrying out its obligations under its construction or repair contracts. Control of the vessel clearly remained with the United States Navy or the private shipowner. BIW could not, for example, use a vessel for its own commercial ventures or for any other purpose normally within the prerogative of an owner. Compare Olsen v. Todd Shipyards Corp., supra, 521 F.2d 31 and

Blair v. United States Steel Corp., 444 F.2d 1390 (3rd Cir. 1971) (per curiam), cert. denied, 404 U.S. 1018 (1972). BIW's control over the vessels was tightly circumscribed by the contracts and was subject to the owner's ultimate authority. BIW could not move vessels within the yard without first obtaining approval from either the United States Navy Supervisor or the private owner's representative. Although BIW crews manned the vessels during the dock, sea and acceptance trials, operation of the vessels during these trials was mandated by contract and was strictly in accordance with agendas approved by the Supervisor of the owner's representative. In short, the full-time presence of the Navy Supervisor or private owner's representative; and the authority of the

Supervisor or owner's representative; the constant inspection and supervision of the work by the Supervisor or owner's representative; and the authority of the Supervisor owner's representative to order changes in the work or to stop work entirely plainly establish that BIW did not have the type of exclusive "control" over these vessels which is required for pro hac vice ownership. Accord, Bossard v. Port Allen Marine Service, Inc., 624 F.2d 673, 674 (5th Cir. 1980) (per curiam); Rao v. Hillman Barge & Construction Co., 467 F.2d 1276, 1277 (3rd Cir. 1972) (per curiam); Bailey v. Johns-Manville Sales Corp., Civ. No. 76-155-NN, slip op. at 5 (E.D. Va. Feb. 12, 1982); Olsen v. Todd Shipyards Corp., supra, 435 F. Supp. at 571-72, 572 n.15. But see Simko v. C & C Marine Maintenance

Co., 484 F. Supp. 401, 403-04 (W.D. Pa.), aff'd, 639 F.2d 772, 775 (3rd Cir. 1980).

The Court holds that BIW was not the owner pro hac vice of vessels being constructed or repaired in its yard during the periods of time these plaintiffs were employed by BIW; that BIW was not a "vessel" within the meaning of Section 902(21) of the LHWCA; and that therefore BIW is not subject to liability to R-M for contribution and indemnity under Section 905(b) of the Act.

III.

ORDER

The Court being persudaded that the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that BIW is entitled to

a judgment as a matter of law, Fed. R. Civ. P. 56(c), BIW's motion for summary judgment dismissing R-M's third-part complaints in the above-entitled actions is granted and the Clerk of this Court is directed to enter judgment forthwith dismissing said third-party complaints with prejudice.

Dated at Portland, Maine this 9th day of August 1982.

United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

In re ALL MAINE ASBESTOS LITIGATION)

(BIW Cases))

MEMORANDUM OF OPINION AND ORDER OF THE COURT

GIGNOUX, Senior District Judge

Presently pending in this Court are approximately fifty actions which have been brought by present and former employees, and the representatives of deceased employees, of Bath Iron Works (BIW), a private shipyard in Bath, Maine, against various manufacturers and suppliers of asbestos-containing products. Plaintiffs seek recovery of compensatory and punitive damages for

injuries the employees allegedly sustained from exposure to defendants' products during the course of their employment at BIW. The complaints assert causes of action based on negligence, strict liability, and breach of express and implied warranties. Jurisdiction is predicated upon diversity of citizenship. 28 U.S.C. §1332(a); Austin v. Unarco Industries, Inc., 705 F.2d 1,3 (1st Cir.), cert. dismissed, 104 S. Ct. 34 (1983).

In addition to denying any liability to the plaintiffs, certain defendants have filed third-party actions against BIW seeking contribution and indemnity. With the Court's approval, a model third-party complaint has been filed in each plaintiff's action. The model third-party complaint contains six

counts. In the first four counts, defendants allege that BIW "willfully, wantonly, recklessly and negligently" failed to exercise due care in the discharge of its duty to protect the health and safety of its employees by failing to warn them of the dangers from exposure to asbestos products and by failing to protect them from its dangers. In Count I, defendants seek pro tanto relief, asserting that they are entitled to have any judgment for compensatory damages recovered against them by a plaintiff reduced by the amount of BIW's worker's compensation lien, or, alternatively, that they are entitled to a judgment against BIW in the amount of that lien. Count II seeks contribution or indemnity by BIW for any punitive damages recovered by a plaintiff against

defendants. Count III seeks indemnity by BIW to the extent of any judgment recovered by a plaintiff against defendants for loss of consortium or consequential or punitive damages. In Count V, defendants allege that BIW's medical care of its employees was negligent and seek contribution and indemnity by BIW on that basis. In Count VI, defendants seek contribution and indemnity by BIW as the owner pro hac vice of the vessels in its shipyard on which the employees worked.

This is the "third round" of an ongoing dispute between defendants and BIW concerning BIW's third-party liability for its employees' asbestos-related injuries. In the "first round," the Court granted BIW's motion for summary judgment and dimissed defendants'

third-party claims as barred by the excluive liability provision of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 905(a). Austin v. Johns-Manville Sales Corp., 508 F. Supp. 313 (D. Me. 1981).[1] The "second round" was precipitated by the subsequent holding of the United States Supreme Court in Lockheed Aircraft Corp. v. United States, U.S. ,103 S. Ct. 1033, 51 U.S.L.W. 4206 (U.S. Feb. 23, 1983), that the exclusive liability provision of the Federal Employees Compensation Act (FECA), 5 U.S.C. §8116(c), does not bar an indemnity action by an unrelated third party against the United States. Being

[1]It is undisputed that the BIW employees and deceased employees in these cases were covered by the LHWCA, 33 U.S.C. §901 et seq.

persuaded that the analysis in Austin was inconsistent with the teaching of Lockheed, this Court granted a motion for reconsideration of its Austin ruling, vacated its prior order, and denied BIW's motion for summary judgment. All Maine Asbestos Litigation (BIW Cases), Bench Ruling (D. Me. Mar. 9, 1984).[2] At the same time, the Court reserved ruling on BIW's newly-raised defense that it was protected from third-party claims against it as barred by section 4 of the Maine Act. The record before the Court consists of the pleadings and three affidavits filed by BIW in support of its motion. The issues have been comprehensively briefed and argued.

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[2]A copy of the Court's March 9, 1984 Bench Ruling is attached as Appendix A.

For the reasons to be stated, the Court has concluded that so much of BIW's motion as seeks dismissal of defendants' claims for contribution and indemnity must be granted, but that so much of the motion as seeks dismissal of the claims for pro tanto relief must be denied.

I.

The Court must begin its analysis with the Supreme Court's Lockheed opinion. In Lockheed, the Court held only that "FECA's exclusive liability provision, 5 U.S.C. §8116(c), does not directly bar a third-party indemnity action against the United States." U.S. , 103 S. Ct. at , 51 U.S.L.W. at 4208. Relying on its review of the legislative history, it found that "(t)here is no evidence whatever that Congress was concerned with the rights of

unrelated third parties,'" and concluded that section 8116(c) "had been intended to govern only the relationship 'between the Government on the one hand and its employees and their representatives or dependents on the other.'" Id. at , 103 S. Ct. at , 51 U.S.L.W. at 4207 (quoting Weyerhauser S.S. Co. v. United States, 372 U.S. 597 1601 (1963)). Thus, contrary to defendants' contention, Lockheed did not affirmatively confer upon Lockheed a substantive indemnity claim against the United States. Indeed, the Court expressly stated that the validity of Lockheed's underlying claim for indemnity was not before it. Id. at , 103 S. Ct. at , 51 U.S.L.W. at 4208 n.8. Rather, to determine that question, the Court made clear that

recourse must be had to the "governing substantive law." Id. at , 51 U.S.L.W. at 4208.

In its March 9, 1984 ruling, this Court held that the Lockheed interpretation of FECA's exclusive liability provision applied with equal force to the "nearly identical" LHWCA provision, 33 U.S.C. §905(a)). See Lockheed, U.S. at , 103 S. Ct. at ,51 U.S.L.W. at 4207. This Court also concluded that "there is no evidence either in the language of the statute or in the congressional history that Congress addressed itself to, or was in any way concerned with, the rights of non-vessel owner third parties." All Maine Asbestos Litigation (BIW Cases), Bench Ruling, see infra Appendix A to Decision of July 5, 1984 at A-61. It

follows that, as in Lockheed, it is to the governing substantive law that the Court must look to determine the availability to defendants of a third-party claim for indemnity or contribution[3] against BIW. Since jurisdiction of these cases is based upon diversity of citizenship, Austin v. Unarco Industries, Inc., 705 F.2d at 3, the governing substantive law is that which a Maine court would apply. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

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[3]Although in Lockheed the Supreme Court was concerned only with a third-party indemnity claim, it is clear that the holding is equally applicable to a third-party contribution claim. See Johns-Manville Sales Corp. v. United States, No. C-81-4561, slip op. at 10 (N.D. Cal. Jan. 6, 1984), reprinted in Asbestos Litigation Reporter 7, 721, 7, 724 (Jan. 20, 1984); see also Prather v. The Upjohn Co., MCA No. 81-0211, slip op. at 3 (N.D. Fla. Feb. 15, 1984).

II.

It is undisputed that BIW is a compensation-paying employer covered by the Maine Act, 39 Me. Rev. Stat. Ann. §1 et seq (1978 & Supp. 1983-84). Section 4 of the Maine Act provides that employers who provide workers' compensation "shall be exempt from civil actions because of such injuries either at common law or under sections 141 to 148, under Title 14, sections 8101 to 8118 or under Title 18-A, section 2-804." 30 Me. Rev. State. Ann. §4 (Supp. 1983-84).[4] The Supreme Judicial Court of Maine has held unequivocally that the employer's immunity granted by this section "extends to all non-contractual rights of

[4]The statutes referred to relate to employers' liability in the absence of workers' compensation, actions under the Maine Tort Claims Act, and actions for wrongful death.

contribution and indemnity." McKellar v. Clark Equipment Co., 472 A.2d 411, 416 (Me. 1984); Roberts v. American Chain & Cable Co., 259 A.2d 43, 51 (Me. 1969). Thus, section 4 of the Maine Act, as interpreted by the Maine Court, provides BIW with immunity from third-party claims for contribution or indemnity arising from work-related injuries to its employees.

III.

Defendants advance two grounds in support of their argument that Section 4 of the Maine Act cannot be applied in these cases to immunize BIW from liability on their third-party claims. First, they contend that the federally-enacted LHWCA has preempted section 4 of the Maine Act. Second, they argue that where plaintiffs have elected to receive

compensation under the LHWCA, rather than under the Maine Act, section 4 of the Maine Act does not apply.[5] The Court finds no merit in either argument.

A. Preemption

In Sun Ship, Inc. v. Pennsylvania, 447 U.S. 715, 719, 722 (1980), the Supreme Court clearly enunciated the three jurisdictional spheres within which marine-related injuries fall. At the seaward extreme, nonlocal maritime injuries fall under the LHWCA, and Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917), places a constitutional bar on States applying their compensation laws. Sun Ship, 447 U.S. at 719; see e.g., Anderson v. Alaska Packers

[5]The affidavits submitted by BIW in support of its motion disclose that the vast majority of plaintiffs have chosen to receive compensation under the LHWCA.

Association, 635 P.2d 1182, 1184-85 (Alaska 1981). At the other extreme, beyond the landward extension of the LHWCA, see 33 U.S.C. §903(a), state compensation laws alone control. Sun Ship, 447 U.S. at 719. In the "twilight zone" between the Jensen line and the inland limit of the landward extension of the LHWCA "maritime but local" injuries can be compensated under either state or federal law, id., and "federal jurisdiction . . . coexist(s) with state compensation laws." Id. at 722; see Calbeck v. Travelers Insurance Co., 370 U.S. 114, 128-29 (1962); Davis v. Department of Labor, 317 U.S. 249, 256 (1942). Concurrent federal and state jurisdiction in the "twilight zone" is now too well established to be disputed. Director v. Perini North River

Associates, U.S. , , S. Ct. , , 51 U.S.L.W. 4074, 4080-81 (U.S. Jan. 11, 1983); Landry v. Carlson Mooring Service, 643 F.2d 1080, 1087-88 (5th Cir.), cert. denied 454 U.S. 1123 (1981); Newport News Shipbuilding & Drydock Co. v. Director, 583 F.2d 1273, 1276-78 (4th Cir. 1978), cert. denied, 440 U.S. 915 (1979); Thompson v. Teledynbe Movable Offshore, Inc., 419 So.2d 822, 826 (La. Sup. Ct. 1982); American Original Foods, Inc. v. Ford, 272 S.E.2d 187, 188-90 (Va. Sup. Ct. 1980); Ward v. State Workmen's Compensation Commissioner, 301 S.E. 2d 592, 594 (W.Va. Sup. Ct. App. 1983); see Murray v. City of Augusta, 394 A.2d 1171, 1173 (Me. 1978); 4 A. Larson, The Law of Workmen's Compensation §§ 89.70-89.73 (1983).

Within the "twilight zone" of concurrent jurisdiction, the LHWCA "supplements, rather than supplants, state compensation law." Sun Ship, 447 U.S. at 720; see 1A e. Jhirad, Benedict on Admiralty § 23a at 2-18.2-2.19 (7th ed. 1983). The LHWCA would only preempt a conflicting provision of a state compensation act. See Sun Ship, 447 U.S.at 724 n.6; Murphy v. Woods Hole, Martha's Vineyard & Nantucket S.S. Authority, 545 F.2d 235, 241 (1st Cir. 1976); see also Askew v. American Waterways Operators, Inc., 411 U.S. 325, 341 (1973). Preemption will not be presumed absent a clear conflict between federal and state legislation "in a field which the states have traditionally occupied." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); see

Askew v. ASmerican Waterways Operators, Inc., 411 U.S. at 341; Murray v. City of Augusta, 394 A.2d at 1173; 4 A. Larson, The Law of Workmen's Compensation §89.71 at 16-286.45 (1983).

Defendants can point to no presently relevant provision of the LHWCA which conflicts with Section 4 of the Maine Act. They suggest that section 905(a) may create such a conflict. But, as previously observed, see ante at 5, Congress, in enacting section 905(a) of the LHWCA, left undisturbed existing law regarding the rights of unrelated third parties against covered employers. Moreover, since the outcome of the third-party litigation does not directly affect any award to the employee, the Court cannot see any conflict between the immunity provision of the Maine Act and

Congress' policy objective of providing adequate benefits to maritime workers. See Sun Ship, 447 U.S. at 723.[6]

B. Election

It is undisputed that, with only a few exceptions, plaintiffs have chosen to receive workers' compensation benefits under the LHWCA, rather than under the Maine Act. Defendants argue that

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[6]The only provision of the LHWCA arguably in conflict with section 4 of the Maine Act is section 905(b), 33 U.S.C. §905(b), which permits a covered employee to recover damages for injuries caused by the negligence of a vessel owned by his employer. See Jones & Laughlin Steel Corp. v. Pfeiffer, U.S. , 103 S. Ct. 2541, 51 U.S.L.W. 4795 (U.S. June 15, 1983); In re All Maine Asbestos Litigation, 581 F.Supp. 963, 975-77 (D. Me. 1984). Plaintiffs in these actions, however, can have no such claim against BIW because, as the Court has previously held, BIW was neither the owner nor the owner pro hac vice, see 33 U.S.C. §902(21), of the vessels upon which the employees worked. See Bernier v. Johns-Manville Sales Corp., Civ. No. 78-98 P (D. Me. Aug. 9, 1982).

plaintiffs' acceptance of LHWCA benefits constitutes an election of the remedy under federal law, precluding the application of state law in these cases. They cite Professor Larson's discussion of conflicts between state workers' compensation acts. See 4 A. Larson The Law of Workmen's Compensation §88. The short answer to this contention is that "(e)lection of remedies involves a choice between inconsistent remedies," whereas "(s)tate and Longshore benefits are not inconsistent but complementary." Id. §89.74 at 16-286.50-.51 (emphasis in original). The courts have thus overwhelmingly rejected the election of remedies argument as between LHWCA and a state workers' compensation act. Calbeck v. Travelers Insurance Co., 370 U.S. at 131-32; Simpson v. Director, 681 F.2d 81,

91 (1st Cir. 1982), cert. denied, 103 S. Ct. 762 (1983); Landry v. Carlson Mooring Service, 643 F.2d at 1087-88; Newport News Shipbuilding & Drydock Co. v. Director, 583 F.2d at 1276-77; Murray v. City of Augusta, 394 A.2d at 1173. But see Poche v. Avondale, Inc., 339 S.E.2d 1212, 1221 (La. 1976).[7] In sum, as

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[7] Professor Larson suggests that Poche was decided as it was because Louisiana is a civil law state and the election doctrine has its roots in Roman Law. See 4 A. Larson, The Law of Workmen's Compensation §89.74 at 16-286.51.

Defendants argue that the Supreme Court recognized an election of remedies in Hahn v. Ross Island Sand & Gravel Co. 358 U.S. 272 (1959) (per curiam). Hahn was based upon a clause in section 903(a) of the LHWCA which provided that the LHWCA did not apply "if recovery . . .through workmen's compensation proceedings may. . .validly be provided by State law." See Hahn, 358 U.S. at 272. The meaning of that language was substantially narrowed as the Supreme Court developed the doctrine of concurrent jurisdiction. See, e.g., Calbeck v. Travelers Insurance Co., 370 U.S. 114 (1962). In any event, Congress eliminated the language upon which Hahn

Professor Larson has observed, "the doctrine of election of remedies is completely out of place as between state and Longshore remedies." 4A. Larson, The Law of Workmen's Compensation §89.74 at 16-286.50.

IV.

There remains for consideration only the prayer for pro tanto relief in Count I of defendants' third-party complaint. The question of whether section 4 of the Maine Act immunizes a compensation-paying employer from pro tanto claims presents a question of Maine law on which the Supreme Judicial court of Maine has not spoken. Moreover, the justices of the Maine Superior Court, courts in other

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(footnote continued from previous page) was based when it amended the LHWCA in 1972. Pub. L. 92-576, § 2(c), 86 Stat. 1251 (Oct. 27, 1972).

jurisdictions construing similar compensation statutes, and the commentators are split on this issue. Compare Burnell v. West Oxford Agricultural Society, Docket No. CV 81-151 (Oxford, June 28, 1983) (Bradford, J.) (permitting pro tanto recovery); Associated Construction & Engineering Co. v. Workers' Compensation Appeals Board, 587 P.2d 684, 150 Cal. Rptr. 888 (Cal. 1978) (Mosk, J.) (permitting pro tanto recovery in California); Witt v. Jackson, 17 Cal. Rptr. 369, 366 P.2d 641 (1961) (Traynor J.) (permitting pro tanto recovery in California); Note, Exceptions to the Exclusive Remedy Requirements of Workers' Compensation Statutes, 96 Harv. L. Rev. 1641 1660-61 (1983) (arguing for pro tanto recovery in California).Note, New Policies Bearing on the Negligent

Employer's Immunity from Loss-Sharing, 29 Me. L. Rev. 243 (1978) (arguing for pro tanto relief), with Wacome v. Blue Rock Industries, Docket No. CV-82-270 (Kennebec, Mar. 16, 1983) (McCarthy, J.) (denying pro tanto recovery); Shorey v. Boulter & Son, Inc., Docket No. 77-475 (Penobscot, May 3, 1979) (Brown, J.) (denying pro tanto recovery); Schweizer v. Elox Division of Colt Industries, 70 N.J. 280, 359 A.2d 857 (1976) (holding courts in New Jersey do not have the authority to grant pro tanto recovery); 2A A. Larson, The Law of Workmen's Compensation §§ 76.20 et seq. (1982) (arguing aginst pro tanto relief); see also Kimball v. Lyons Machine Works, Civ. No. 75-119 SD (D. Me. July 22, 1976)(allowing a pro tanto claim to survive a motion to dismiss).

The issue presented here raises a question of Maine law as to which there is no clear controlling precedent in the decisions of the Supreme Judicial Court. In these circumstances, especially in view of the division among the Maine Superior Court justices and authorities elsewhere, the prudent course for this Court to follow is to deny BIW's motion for summary judgment insofar as it seeks dismissal of the claims for pro tanto relief, and, upon its own motion or upon request of a party at the close of trial, to consider certifying the question to the Supreme Judicial Court of Maine pursuant to Me. R. Civ. P. 76B. Such certification should be made only on a complete record. See Hiram Ricker & Sons v. Students International Meditation

Society, 342 A.2d 262 (Me. 1975); White v. Edgar, 320 A.2d 668 (Me. 1974); In re Richards, 223 A.2d 827 (Me. 1966).

V.

In accordance with the foregoing, it is ORDERED as follows:

(1) So much of BIW's motion for summary judgment as seeks dismissal of the claims for contribution and indemnity in defendants' Model Third-Party Complaint is GRANTED;

(2) So much of BIW's motion for summary judgment as seeks dismissal of the claims for pro tanto relief in defendants' Model Third-Party Complaint is DENIED.

Dated at Portland, Maine this 5th day of July 1984.

U.S. District Judge

APPENDIX A TO DECISION OF JULY 5, 1984

The motion before the Court is the motion filed by Raymark Industries, Incorporated, On September 13, 1983, requesting that this Court reconsider its decision and order in the case of Austin v. Johns-Manville Sales Corporation, 508 F. Supp. 313 (D. Me. 1981). In that case this Court ruled, on the basis of then authoritative Supreme Court cases, that the third-party claims for contribution and/or indemnity asserted by the defendant Armstrong Cork against Bath Iron Works were barred by the exclusive liability provision of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §905(a). The Court therefore granted BIW's motion for a summary judgment dismissing the amended third-party complaint of Armstrong Cork.

Subsequently, the Court entered similar orders, without further argument, in three other asbestos actions, the so-called Bernier, Moore and Jones cases, Civil Nos. 78-98, 79-55 and 81-00145 (Consolidated) and Civil No. 79-73, granting BIW's motions for summary judgment dismissing third-party complaints filed against BIW by defendant Raybestos-Manhattan (now Raymark Industries, Incorporated). The Raymark motion presently before the Court seeks reconsideration of all these and any similar rulings by this Court.

The basis of the motion for reconsideration is the subsequent opinion of the United States Supreme Court in Lockheed Aircraft Corp. v. United States, decided February 23, 1983. In Lockheed, the Supreme Court held that the exclusive

liability provision of the Federal Employees' Compensation Act, 5 U.S.C. §8116(c), did not bar a third-party indemnity action by an unrelated third party against the United States. Having thoroughly analyzed the Supreme Court's opinion in Lockheed, the briefs submitted by counsel on the present motion, and the earlier Supreme Court cases referred to in those briefs, this Court is persuaded that the rationale of the Supreme Court in Lockheed compels the conclusion that this Court's ruling in Austin cannot survive.

The language of the exclusivity provision of the LHWCA, Section 905(a), is in all material respects identical to the language of the exclusive liability provision of the FECA, §8116(c). In Lockheed, the Supreme Court construed

this language as not barring third-party indemnity actions against the United States, the employer covered by the FECA, by unrelated third parties. The basis of the Supreme Court's decision in Lockheed was both the language of § 8116(c) and the legislative history of the FECA. As to the latter, the Supreme Court concluded that there is no evidence that Congress was concerned with the rights of unrelated third parties. In this connection, the Court pointed out that § 8116(c) was intended to govern only the rights of employees, their relatives, and persons claiming through or on behalf of them, these being the only parties who benefit from the "quid pro quo" compromise of the FECA.

Applying the Supreme Court's analysis in Lockheed to § 905(a) of the LHWCA, the language of § 905(a) is in all material respects identical to the language of § 8116(c), and the Supreme Court's construction of that language in FECA would appear to be equally applicable to the corresponding LHWCA language. Moreover, a review of the legislative history of the LHWCA, including the 1972 amendments, persudades this Court that it is equally unpersuasive to establish that Congress was concerned with the rights of unrelated non-vessel owner third parties. Insofar as unrelated non-vessel owner third parties are concerned, the 1972 amendments involved no "quid pro quo" compromise similar to that which benefited vessel owners. In short, there

is no evidence either in the language of the statute or in the congressional history that Congress addressed itself to, or was in any way concerned with, the rights of non-vessel owner third parties.

The Court has concluded that Lockheed's analysis of the exclusivity provision of the FECA is equally applicable to the exclusivity provision of the LHWCA. It follows that the ruling of this Court in Austin is inconsistent with Lockheed and cannot stand.

Raymark's motion for reconsideration of the Austin ruling is granted. The order granting BIW's motion for summary judgment dismissing the third party complaint of Armstrong Cork in that case, and the further orders of this Court granting BIW's motion for summary judgment dismissing the third party

complaints of Raybestos-Manhattan in three other cases, are vacated. The Court will enter an order denying BIW's motions for summary judgment.

The denial of these motions is without prejudice to the right of BIW to file an appropriate motion based on its newly-raised defense that the substantive law which this Court must apply, quite apart from Section 905(a), bars the third party claims for contribution and indemnity asserted against BIW in these cases.